

SENATE BILL 555

By Overbey

AN ACT to amend Tennessee Code Annotated, Title 34 and Title 40 relative to a person appointed by a court to exercise duties for another person.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Title 34, Chapters 1 and 3 are amended by deleting the language “disabled person” wherever it may appear and substituting instead the language “person with a disability”.

SECTION 2. Tennessee Code Annotated, Section 34-1-101, is amended by deleting subdivision (4) and substituting instead the following:

(4)

(A) “Conservator” or “coconservators” means a person or persons or an entity appointed by the court to exercise the decision-making rights and duties of the person with a disability in one or more areas in which the person lacks capacity as determined and required by the orders of the court;

(B) “Conservatorship” is a proceeding in which a court removes the decision-making powers and duties, in whole or in part, in a least restrictive manner, from a person with a disability who lacks capacity to make decisions in one or more important areas and places responsibility for one or more of those decisions in a conservator or coconservators.

SECTION 3. Tennessee Code Annotated, Section 34-1-101, is amended by deleting subdivision (7) and substituting instead the following:

() “Person with a disability” means any person eighteen (18) years of age or older determined by the court to be in need of partial or full supervision, protection, and

assistance by reason of mental illness, physical illness or injury, developmental disability, or other mental or physical incapacity;

SECTION 4. Tennessee Code Annotated, Section 34-1-101, is amended by deleting subdivision (11) and substituting instead the following:

() "Guardian ad litem" means a person meeting the qualifications set forth in § 34-1-107(c) appointed by the court to investigate the allegations in a petition, perform the duties set forth in § 34-1-107(d) and report to the court with recommendations as to the best interests of the respondent;

SECTION 5. Tennessee Code Annotated, Section 34-1-101, is amended by deleting subdivision (15), and substituting instead the following:

() "Property management plan" means the plan submitted by the fiduciary for the investment and management of the property of a minor or person with a disability;

SECTION 6. Tennessee Code Annotated, Section 34-1-101, is amended by deleting subdivision (17), and substituting instead the following:

() "Respondent" means a person who is a minor or is alleged to be a person with a disability for whom a fiduciary is being sought.

SECTION 7. Tennessee Code Annotated, Section 34-1-104(a), is amended by deleting the subsection in its entirety and substituting instead the following:

(a) Except as provided in subsections (b) and (c), no person shall undertake the administration of the estate of a minor or person with a disability until the person has been issued letters of guardianship or letters of conservatorship; provided, that no guardian or conservator shall be appointed if the property of the minor or person with a disability is deposited with the clerk of the court subject to distribution on order of the court. The letters of conservatorship shall either:

(1) Recite the specific powers to be exercised by the conservator and the specific powers retained by the person with a disability; or

(2) Have attached to them the order or orders of the court specifying the powers to be exercised by the conservator and the powers retained by the person with a disability.

SECTION 8. Tennessee Code Annotated, Section 34-1-106(b), is amended by deleting the language “respondent or with whom the respondent is living” and substituting instead the language “respondent, including any known residential provider, or with whom the respondent is living.”

SECTION 9. Tennessee Code Annotated, Section 34-1-107(a)(1), is amended by deleting the subdivision in its entirety and substituting instead the following:

(1) Except as otherwise provided in this section, on the filing of a petition for the appointment of a fiduciary, the court shall appoint a guardian ad litem. The court may appoint a guardian ad litem in any proceeding. If the respondent is represented by counsel who has made an appearance for the respondent, the court may appoint or retain a guardian ad litem. The guardian ad litem in all situations shall investigate the facts and report to the court as instructed by this section and any order of the court.

SECTION 10. Tennessee Code Annotated, Section 34-1-107(d)(1), is amended by deleting the subdivision in its entirety and substituting instead the following:

(d)

(1) The guardian ad litem owes a duty to the court to impartially investigate the facts and make a report and recommendations to the court. The guardian ad litem serves as an agent of the court, and is not an advocate for the respondent or any other party.

SECTION 11. Tennessee Code Annotated, Section 34-1-107(d)(2)(D), is amended by deleting subdivision (D) in its entirety and substituting instead the following:

(D) Make a report and recommendations to the court concerning the issues of:

(i) Whether a fiduciary should be appointed for the respondent;

(ii) If a fiduciary should be appointed, whether the proposed fiduciary is the appropriate person to be appointed; and

(iii) Any other matters as directed by the court.

SECTION 12. Tennessee Code Annotated, Section 34-1-107(d)(3), is amended by deleting subdivision (3) in its entirety and substituting instead the following:

(3) In a proceeding for the appointment of a conservator, the guardian ad litem shall investigate the physical and mental capabilities of the respondent. The guardian ad litem's investigation shall include:

(i) An in person interview with the respondent; and

(ii) A review of the sworn report required by § 34-3-105 to verify that the sworn statement contains:

(a) A detailed description of the respondent's physical or mental conditions or both that may render the respondent a person with a disability; and

(b) A detailed description of how the respondent's physical or mental conditions or both may impair the respondent's ability to function normally.

SECTION 13. Tennessee Code Annotated, Section 34-1-107(d)(4), is amended by deleting subdivision (4) in its entirety and substituting instead the following:

(4) In a proceeding seeking the appointment of a fiduciary to manage the respondent's property, the guardian ad litem shall investigate the:

(A) Nature and extent of the respondent's property; and

(B) Financial capabilities and integrity of the proposed fiduciary. In evaluating the financial capabilities of the proposed fiduciary, the guardian ad litem may take such actions as directed by the court and as the guardian ad litem deems necessary, which may include but are not limited to:

- (i) Obtaining and reviewing the proposed fiduciary's credit report;
- (ii) Inquiring into whether and to what extent the proposed fiduciary has previous experience in managing assets of the same or similar type and value as the respondent's assets;
- (iii) Inquiring into how the proposed fiduciary plans to manage the respondent's assets;
- (iv) Inquiring into whether the proposed fiduciary has previously borrowed funds from the respondent or received any financial assistance or benefits from the respondent; and
- (v) Interview any persons with knowledge and review any documents pertinent to the financial capabilities and integrity of the proposed fiduciary.

SECTION 14. Tennessee Code Annotated, Section 34-1-108(c)(1), is amended by deleting the following language:

(c)

(1) In a proceeding for the appointment of a conservator, a notice of the hearing shall be served on the respondent. The notice of hearing shall be substantially in the following form:

and substituting instead the following language:

(c)

(1) In a proceeding for the appointment of a conservator, a notice of the hearing shall be served on the respondent by the guardian ad litem or as otherwise authorized under the Tennessee Rules of Civil Procedure. The notice of hearing shall be substantially in the following form:

SECTION 15. Tennessee Code Annotated, Section 34-1-108(c), is amended by adding the following new subdivision (3):

(3) The notice shall also be served upon the closest relative or relatives of the respondent other than the petitioner and upon the person or institution, if any, having care and custody of the respondent or with whom the respondent is living. Service by mail, sent to the last known address of such persons or institution, shall be sufficient for purposes of this subdivision.

SECTION 16. Tennessee Code Annotated, Section 34-1-111, is amended by deleting subsection (b) and substituting instead the following:

(b) Except as provided in subsection (i), within sixty (60) days after each anniversary of the accounting required in subsection (a) or any other end of an accounting period selected by the fiduciary after the subsection (a) accounting, the fiduciary shall file a sworn accounting with the court. To select an accounting period end other than the end of the month during which the fiduciary was appointed, the fiduciary shall file a statement with the clerk advising of the accounting period selected. The accounting period shall not exceed twelve (12) months.

SECTION 17. Tennessee Code Annotated, Section 34-1-111(h), is amended by deleting the language "Accountings may" and substituting instead the language "Financial accountings may".

SECTION 18. Tennessee Code Annotated, Section 34-1-111(h), is amended by adding the following new subdivision (3):

(3) Subdivision (c)(2) requiring a report regarding the physical or mental condition of the person with a disability may not be waived or excused.

SECTION 19. Tennessee Code Annotated, Section 34-1-111(i), is amended by adding the following language to the end of subdivision as the last sentence:

The provisions of this section related to financial accountings do not apply to fiduciaries who do not have authority over the property of the person with a disability.

SECTION 20. Tennessee Code Annotated, Section 34-1-111, is amended by adding the following new subsection (a) and redesignating existing subsections accordingly:

(a) Except as provided in subsection (i), within thirty (30) days after the six month anniversary of the fiduciary's date of appointment, the fiduciary shall file a sworn accounting with the court.

SECTION 21. Tennessee Code Annotated, Section 34-1-114, is amended by deleting the section in its entirety and substituting instead the following:

34-1-114.

(a) The costs of the proceedings, which are the court costs, the guardian ad litem fee and expenses incurred by the guardian ad litem in conducting the required investigations, the required medical examination costs ,and the attorney's fee for the petitioner, may, in the court's discretion, be charged against the property of the respondent to the extent the respondent's property exceeds the supplemental security income eligibility limit, or to the petitioner or any other party, or partially to any one or more of them as determined in the court's discretion. In exercising its discretion to charge some or all of the costs against the respondent's property, the fact a conservator is appointed or would have been appointed but for an event beyond the petitioner's control is to be given special consideration. The guardian ad litem fee and the attorney's fee for the petitioner shall be established by the court. If a fiduciary is cited for failure to file an inventory or accounting, the costs incurred in citing the fiduciary, in the discretion of the court, may be charged to and collected from the cited fiduciary.

(b) If the principal purpose for bringing the petition is to benefit the petitioner and there would otherwise be little, if any, need for the appointment of a fiduciary, the costs of the proceedings may be assessed against the petitioner, in the discretion of the court.

SECTION 22. Tennessee Code Annotated, Section 34-1-119(c)(2), is amended by deleting the language "potentially disabled person" and substituting instead the language "person with a potential disability".

SECTION 23. Tennessee Code Annotated, Section 34-1-129, is amended by deleting the section in its entirety and substituting instead the following:

34-1-129. Upon the entry of the order appointing a fiduciary and the submission of a bond consistent with the order, the clerk shall issue letters of conservatorship or letters of guardianship. The letters of conservatorship or guardianship shall either:

(1) Recite the specific powers removed from the minor or person with a disability and transferred to the fiduciary; or

(2) Have attached to them the order or orders of the court specifying the powers removed from the minor or person with a disability and transferred to the fiduciary. If the fiduciary has been granted less than full authority over the person and property of the minor or person with a disability in the order of appointment, the clerk shall mark the letters prominently with the term "LIMITED."

SECTION 24. Tennessee Code Annotated, Title 34, Chapter 1, is amended by adding a new section thereto:

34-1-132.

(a) If the court finds that compliance with the procedures of this title will likely result in substantial harm to the respondent's health, safety, or welfare, and that no other person, including an agent acting under the Health Care Decision Act compiled in title 68, chapter 11, part 18, or a person acting under the Durable Powers of Attorney for Healthcare Act, compiled in chapter 6, part 2 of this title or a living will pursuant to title 32, chapter 11, appears to have authority to act, willingness to act, and is acting in the best interests of the respondent in the circumstances, then the court, on petition by a person interested in the respondent's welfare, may appoint an emergency guardian or

conservator whose authority may not exceed sixty (60) days and who may exercise only the powers specified in the order. Immediately upon receipt of the petition for an emergency guardianship or conservatorship, the court shall appoint an attorney ad litem to represent the respondent in the proceeding. Except as otherwise provided in subsection (b), reasonable notice of the time and place of a hearing on the petition must be given to the respondent and any other person as the court directs.

(b) An emergency guardian or conservator may be appointed without notice to the respondent and the attorney ad litem only if the court finds upon a sworn petition that the respondent will be substantially harmed before a hearing on the appointment can be held. If the court appoints an emergency guardian or conservator without notice to the respondent, the respondent must be give notice of the appointment within forty eight (48) hours after the appointment. The court shall hold a hearing on the appropriateness of the appointment within five (5) days after the appointment.

(c) Appointment of an emergency guardian or conservator, with or without notice, is not a determination of the respondent's incapacity.

(d) The court may remove an emergency guardian or conservator at any time. The court may appoint a guardian ad litem to investigate the circumstances. An emergency guardian or conservator shall make any report the court requires. In other respects, the provisions of this title concerning guardians or conservators apply to an emergency guardian or conservator.

(e) The time periods set forth above in this section are mandatory and not directory. Failure to comply with those provisions shall void any emergency appointment and remove the authority previously granted to an emergency fiduciary.

SECTION 25. Tennessee Code Annotated, Section 34-3-104(7)(A) and (B), are amended by deleting the language “medical” wherever it may appear.

SECTION 26. Tennessee Code Annotated, Section 34-3-104, is amended by adding the following new subdivision (10):

(10) A request for a guardian ad litem, conservator or coconservator, or attorney ad litem with specific experience or expertise in matters like those faced by the respondent, if warranted under the circumstances.

SECTION 27. Tennessee Code Annotated, Section 34-3-105, is amended by adding the following new subsections:

(d) The examiner's sworn report shall be prima facie evidence of the respondent's disability and need for the appointment of a fiduciary unless the report is contested and found to be in error.

(e) If upon an additional finding that the person with a disability poses a threat to self or others in accordance with the mental health law.

SECTION 28. Tennessee Code Annotated, Section 34-3-106, is amended by deleting subdivisions (3), (4) and (5) and substituting instead the following:

(3) Appeal the final decision on the petition with the assistance of an attorney ad litem or adversary counsel;

(4) Attend any hearing;

(5) Have an attorney ad litem appointed to advocate the interests of the respondent; and

(6) Request a protective order placing under seal the respondent's health and financial information, including reports provided under § 34-3-105(c).

SECTION 29. Tennessee Code Annotated, Section 34-3-107(1), is amended by deleting the language "conservators" and substituting instead the language "coconservators".

SECTION 30. Tennessee Code Annotated, Section 34-3-107, is amended by deleting subdivision (2) and substituting instead the following:

(2) Enumerate the powers removed from the respondent and those to be vested in the conservator. To the extent not specifically removed, the respondent shall retain and shall exercise all of the powers of a person without a disability. The court may consider removing any rights of the person with a disability and vesting some or all in a conservator. Such rights may include but are not be limited to:

(A) The right to give, withhold, or withdraw consent and make other informed decisions relative to medical and mental examinations and treatment;

(B) The right, to make end of life decisions:

(i) To consent, withhold, or withdraw consent for the entry of a “do not resuscitate” order or the application of any heroic measures or medical procedures intended solely to sustain life and other medications; and

(ii) To consent or withhold consent concerning the withholding or withdrawal of artificially provided food, water, or other nourishment or fluids;

(C) The right to consent to admission to hospitalization, and to be discharged or transferred to a residential setting, group home, or other facility for additional care and treatment;

(D) The right to consent to participate in activities and therapies which are reasonable and necessary for the habilitation of the respondent;

(E) The right to consent or withhold consent to any residential or custodial placement;

(F) The power to give, receive, release, or authorized disclosures of confidential information;

(G) The right to apply for benefits, public and private, for which the person with a disability may be eligible;

(H) The right to dispose of personal property and real property subject to statutory and judicial constraints;

(I) The right to determine whether or not the respondent may utilize a Tennessee driver license for the purpose of driving;

(J) The right to make purchases;

(K) The right to enter into contractual relationships;

(L) The right to execute instruments of legal significance;

(M) The right to pay the respondent's bills and protect and invest the respondent's income and assets;

(N) The right to prosecute and defend lawsuits; and

(O) The right to execute, on behalf of the respondent, any and all documents to carry out the authority vested above.

SECTION 31. Tennessee Code Annotated, Section 34-3-108, is amended by deleting subsection (c) and substituting instead the following:

(c) The court, upon receipt of the petition filed under this section, shall conduct a hearing. At the hearing, the person with a disability has all the rights set out in § 34-3-106. Prior to the holding of the hearing, the court may require that the person with a disability submit to an examination as required by § 34-3-105 to support the person with a disability's contention that a conservator is no longer needed.

SECTION 32. Tennessee Code Annotated, Section 34-3-108(e), is amended by deleting the second sentence and substituting instead the following language:

If the conservator has responsibility for the property of the person with a disability, within one hundred twenty (120) days after the date the conservatorship terminates, the conservator shall file a preliminary final accounting with the court, which shall account for all assets, receipts, and disbursements from the date of the last

accounting until the date the conservatorship terminates, and shall detail the amount of the final distribution to close the conservatorship.

SECTION 33. Tennessee Code Annotated, Section 40-20-115, is amended by deleting the language “administrator or guardian” and substituting instead the language “administrator or guardian, fiduciary or conservator”.

SECTION 34. This act shall take effect July 1, 2013, the public welfare requiring it.